

C **NATIVE LAW AND CUSTOM:** *Land dispute - Native customary rights - Whether plaintiffs having native customary rights over Bukit Berdiri and Stika forests in Simunjan, Sarawak - Logging activities of timber companies - Whether encroaching into communal land - Construction of rail line - Whether resulting in serious damage to plaintiffs' livelihood - Damages - Whether plaintiffs entitled to damages for trespass*

The plaintiffs were Ibans from three different villages situated in a small town called Simunjan in Sarawak. They brought this action against five defendants for themselves and on behalf of their fellow villagers, including those from four other villages for a declaration that they have native customary rights ('NCRs') over an area of land located at Bukit Berdiri and Stika in Simunjan. The 1st defendant was a timber company issued with a licence to extract merchantable logs from the said area whilst the 2nd defendant was the contractor engaged to do the felling and extraction of the logs (both defendants referred to hereinafter as the 'timber companies'). The 3rd to 5th defendants were the Director of Forests, Sarawak, the Superintendent of Lands & Surveys, Sarawak and the State Government of Sarawak respectively (all referred to hereinafter as the 'State Government'). The plaintiffs claimed that the logging activities of the timber companies had illegally encroached into their communal land, *ie*, the Bukit Berdiri and Stika Forest Reserves which were gazetted in 1959 by the State Government as Communal Forest *vide* Gazette Notification No. 760 ('GN'). They specifically referred to a rail line built by the timber companies over the said land, the construction of which was claimed to have resulted in serious damage to their livelihood. The plaintiffs prayed for various declaratory reliefs respecting their entitlement to the said land including the unconstitutionality of the timber licence, and damages for alleged trespass. The defendants

in their defence submitted, amongst others, that there was inordinate and inexcusable delay on the part of the plaintiff in filing this action as the timber licence was issued way back in 1966, and that rights and privileges were subject to the control of the Director of Forests, *ie*, the 3rd defendant.

Held (for the plaintiffs):

- (1) The GN established only one forest reserve which was over Bukit Berdiri and not Stika as claimed by the plaintiffs. The GN was published in 3 June 1952 and in its Second Schedule, the rights of the inhabitants of seven longhouses and twenty persons were specifically recognised and provided for. Penghulu Ahtan ak Asong, PW2, was able to identify the longhouse he belonged to from the ones listed in the schedule. He was also able to connect the villages in the present action to the seven longhouses listed in the GN and named the present longhouse chief in charge of each village in place of those named in the GN. His evidence was not contradicted. On that strength, it was accepted that the plaintiffs and the people they represented from the seven villages named in the present action did inherit the benefits spelt in and from those named in the GN. The benefits conferred in the GN were akin to that exercisable by Iban claimants of NCRs under their concept of “pemakai menoa” and “pulau”. Therefore, by the gazetting of the forest reserve of Bukit Berdiri, the State Government had recognised that those named therein and now the plaintiffs after them, had NCRs over the Bukit Berdiri Forest Reserve. (para 14)
- (2) The proposed proclamation made in 1953 and tendered in evidence by the State Government constituted a Stika Communal Forest and showed that the Bukit Berdiri and the Stika forests were side by side. Their close proximity to each other lent credence to the plaintiffs’ claim that they had used those two forests for sustenance by collecting timber for their domestic use and for hunting and fishing expedition. The existence of the proposed proclamation rendered it probable that the plaintiffs and their ancestors had been and were using the Stika forest for their needs. The present case being a civil case, the probability of the existence of the plaintiff’s right and the assertions they made were all that was needed for them to discharge the burden of proof that the law placed on them.

- A Had the proposed proclamation been gazetted, the plaintiff's claim for NCRs similar to those made in respect of the Bukit Berdiri Forest Reserve would have been proved beyond reasonable doubt. (paras 15, 16 & 17)
- B (3) The Court of Appeal in *Superintendent of Land & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* did not reject outright the establishing of NCRs by the natives' foraging for food in the jungle. Although it was logical that there should be limits to the area where the foraging should be recognised as establishing NCRs, in the present case that limit had been set out by the constitution of the Bukit Berdiri Forest Reserve and in the proposed proclamation of the Stika Forest as a communal forest. The documents in proof thereof, *ie*, the GN and the proposed proclamation, both tendered by the defendants themselves were the express and implied acknowledgment of the plaintiffs' NCRs over the two forests. (paras 18, 19 & 20)
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- E (4) Other than the oral evidence of the plaintiffs' witnesses, their police reports and the map that could not be relied upon as the maker was not a registered surveyor, there was no other evidence adduced to show the illegal logging claimed by the plaintiffs. The burden of proving under ss. 101 and 103 of the Evidence Act 1950 was not discharged. However, the allegation of encroachment from the construction of the rail line was more than satisfactorily proven. The maps prepared by the Forest Department and by the Land & Survey Department clearly showed that the rail line was drawn right across the Stika Forest and part of the Bukit Berdiri Forest. The obvious probable reason for the rail line was to connect the area under the timber licence given to the 1st defendant which was separated by the two forests. Therefore, by the defendants' own evidence, there was encroachment of the two forest areas, for which restitution should be made to the plaintiffs. (paras 25, 26, 27 & 29)
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- I (5) The construction of the rail line approved by the Director of Forests was granted subject to native and other rights specified in s. 65 of the Forest Ordinance. The facts showed that the timber companies were aware from the start that the timber licence was subject to native rights and when they submitted the plan for the rail line, it did transverse the two

forests. By submitting such a plan, the timber companies could not deny liability of wrongdoing against the plaintiffs. Similarly by approving the plan, the Director of Forests (and the State Government of Sarawak) was conjointly liable to the plaintiffs who did not receive compensation for the construction of the rail line. However, the villagers from Kampong Stika had received compensation and as such they should be excluded from receiving payment for damages. (paras 31 & 32)

- (6) Delay was not an issue in the present case as the compensation for the rail line was only made in 2004 and the police reports on the illegal logging was made in 2006. The plaintiffs' action was founded upon those two matters and not the issuance of the timber licence to the 1st defendant in 1996. It was therefore obvious that their cause of action did not start with the granting of the licence but with those two matters which were specifically pleaded. (para 33)

- (7) The overall evidence showed that the plaintiffs had inherited NCRs over the Bukit Berdiri Forest Reserve and the Stika Forest. The construction of the rail line across the two forests constituted encroachment and trespass. The defendants were jointly and severally liable to pay damages to the plaintiffs except to those from Kampong Stika. (para 35)

[Costs RM50,000 to the plaintiffs to be paid equally by the timber companies and the State Government.]

Case(s) referred to:

Miller v. Minister of Pensions [1947] 2 All ER 372 (*refd*)

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC (*refd*)

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC (*refd*)

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA (*refd*)

TR Usah Lutong & Ors v. Lembaga Tabung Haji & Ors [2009] 9 CLJ 296 HC (*refd*)

Legislation referred to:

Evidence Act 1950, ss. 101, 103

Land Surveyors Ordinance 2001, s. 17(a)

- A For the plaintiffs - Desmond Kho (See Chee How with him); M/s Baru Bian
Advocs
For the 1st-2nd defendants - Esther Wong; M/s Stephen Robert & Wong
Advocs
For the 3rd-5th defendants - Marjanah Adenan (Dewi Rahmaz Majidi with
him) State Legal Officer

- B [Editor's note: The draft of this judgment was completed on 21 March 2011,
the significance of which was relevant as the World Forestry Day was first
celebrated on 21 March 1972. The Minister of Natural Resources &
Environment was quoted in the NST published on the same date, ie, 21 March
C 2011, as saying that 2011's theme was "Forest For Community Livelihood".
The United Nations too had declared 2011 as the International Year of Forests.
It would appear, therefore, that the plaintiffs' struggle for the recognition of their
communal rights over the two forests had an international face and name.]

- D Reported by Usha Thiagarajah

JUDGMENT

Rhodzariah Bujang JC:

- E [1] The three plaintiffs in this action are Iban race and from
three different villages situated in a small rural town called
Simunjan situated in the 1st Division, Sarawak. They have brought
this action, for themselves and on behalf of their fellow villagers,
F including those from four other villages, for a declaration that they
have native customary rights over an area located at Stika (also
spelt as Setika) and Bukit Berdiri, Simunjan. They have sued the
Director of Forests, Sarawak, the Superintendent of Lands &
Surveys, Sarawak and the Sarawak Government as the 3rd-5th
G defendants, respectively. The 1st defendant is a timber company
who was issued with the licence to extract merchantable logs from
the said area and their contractor, engaged to do the felling and
extraction of these logs, issued as the 2nd defendant.
- H [2] The plaintiffs contended in their statement of claim that the
logging activities of the 1st and 2nd defendants have illegally
encroached into their communal land, the Bukit Berdiri and Stika
Forest Reserves which had been gazetted in 1959 by the State
Government as Communal Forest *vide* Gazette Notification No.
I 760. More specifically, they referred to a rail line built by the 1st
and/or the 2nd defendant(s) over the said land, the construction

of which has caused serious damage to its environment, leading to the loss of its timber, polluting its river system and thus, causing serious damage to their livelihood. A

[3] Actions taken by the plaintiffs such as complaints to the District Officer of Simunjan, to the Sarawak Forestry Corporation, the lodging of police reports and even the erection of physical blockades at Bukit Berdiri on 14 September 2006 failed to resolve the disputes and this action was then filed on 4 July 2007. In their statement of claim, various declaratory reliefs were prayed respecting the plaintiffs' entitlement to the said land, including the unconstitutionality of the timber licence and damages, aggravated and exemplary to be paid for the alleged trespass to their land. B C

The Defence Of The 1st And 2nd Defendants

[4] The said defendants, which I will collectively refer to as the timber companies, pleaded that the timber licence was issued to the 1st defendant way back in 1966 and that they have been working in the licensed area since then without any interference or complaint by the plaintiffs until the time and events which led to the filing of this action. They alleged, therefore, there was inordinate and inexcusable delay in the filing of this action. D E

[5] They have also pleaded, relying on Gazette Notification No. 760 that only the Ibans (or Sea Dayaks) under Penghulu Berong were entitled to the right and privileges over the Bukit Berdiri Forest Reserve and even then these rights and privileges are subject to the control of the Director of Forests. F

Defence Of The 3rd-5th Defendants

[6] For brevity, I would, except where expressly named, refer to all these three defendants as the State Government. The State Government denied there was such a communal reserved land as shown in the map 'M' attached to the plaintiffs' statement of claim and that in fact that area shaded in map 'M' is Bukit Berdiri Forest Reserve and it being a forest reserve no native customary rights could be created over it. They also deny that this Gazette Notification No. 760 of 1959 established both the Bukit Berdiri Forest Reserve and Stika Communal Forest as claimed by the plaintiffs or that the timber licensed area encroached into Bukit Berdiri Forest Reserve. It was also specifically pleaded by the State Government that before the timber licence was issued to the G H I

A 1st defendant, the licensed area was still primary jungle as shown by aerial photographs taken in 1951, 1954 and 1955. Just like the first two named defendants, the State Government denied that the plaintiffs have native customary rights over the said forests and that there had been inordinate delay in bringing this action.

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At The Trial

C [7] The 1st plaintiff, Mr. Nicholas Mujah (PW1) was one of the five witnesses called by the plaintiffs. He is a self admitted social activist and besides giving evidence on his villagers and his inherited rights over the land, he sought to explain the map attached to their statement of claim which he drew from the Global Positioning System (GPS) coordinates taken of the logging activities. That map is reproduced at p. 10 of the plaintiffs' bundle of documents (exh. P1), and shows that the said activities was inside the boundary of the communal forest area which he identified as the Stika and Bukit Berdiri Forests. Seven (7) villages were listed by him to be sharing these communal forests, to wit, Kampung Sg. Arus, Kampung Entanggor, Kampung Sg. Lumut, Kampung Lubok Manta, Kampung Setika, Kampung Ensika and
E Kampung Sekitong.

F [8] He further testified that the encroachment and logging activities of the timber companies have destroyed their sources of livelihood, the destruction of their rubber gardens, farm land, 'tembawai' (old settlement sites with orchard garden), burial grounds and sacred sites, the valuable merchantable trees such as belian and meranti and had caused erosion to their land and polluted their rivers.

G [9] Penghulu Athan ak Asong, (PW2) was about 65 years of age when he gave evidence. He testified that he was a councillor with Simunjan District Council and appointed as the 3rd Penghulu for the villages around the Sebang River. The villages in these actions are amongst those under his jurisdiction. As Penghulu, he was also a Superior Native Court Judge. In his testimony, Penghulu Athan ak Asong echoed the evidence of Mr. Nicholas Mujah of how their grandparents and/or parents had not only cultivated the said area with rubber trees, and fruit trees but also used it for their burial grounds and sacred sites. That their people
H depend on the two Forests as their source of livelihood, for the
I fishes, wild games, and timber as the surrounding forest have all

been cleared for oil palm cultivation. He too spoke about the encroachment on their communal forests and the damages suffered by them arising from illegal logging by the timber companies.

[10] The plaintiffs' third witness, Mr. Nicholas Bawin ak Anggat was formerly the Deputy President of Majlis Adat Istiadat Sarawak, a post he held from 12 August 1992 until February 2005. He is quite an authority on Iban custom as his evidence on it has been received by the courts and applied in cases such as *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 HC.

[11] In his witness statement he explained how the Ibans established their native customary rights over the land starting with the concept of 'pemakai menua', followed by 'tanah umai' and 'pulau galau', 'pulau bais', 'pulau buah' and 'temawai'. All these have been explained in decided cases earlier than this and I do not see the necessity of repeating them all in this judgment because in my view, the issue which I need to address here is whether the plaintiffs' native customary rights extend over the Bukit Berdiri Forest Reserve and the Stika Forest and if so whether there was encroachment of the same by the logging activities of the timber companies in these areas.

[12] The 3rd plaintiff, Mr. Pili ak Mit (PW4) gave evidence on the police reports lodged by him on 27 November 2006 with regards to the alleged encroachment by the timber companies and the 2nd plaintiff, Mr. Lai anak Nyambong (PW5) followed with his testimony on the police report he lodged on 9 November 2006 for the same reason.

Types Of Native Customary Rights Claim

[13] It is perhaps appropriate for me to begin my consideration of the dispute here by making clear that native customary rights claims filed in court are generally of two types. The first is when the plaintiff claimed native customary rights over land exclusive to himself, for example, land which he has built his home or cultivated on. The second is communal in nature in that a group of people, residents of a longhouse(s) for instance, stake their claim over land which they share and use, for example, to forage for food, to hunt and fish and, to bury their dead. All these are evident (the plaintiffs in this case being Ibans) in the Iban concept of

A acquisition of native customary rights known as pemakai menoa, temuda and pulau. It is obvious from my earlier narration of the pleading and evidence that I am concerned in this judgment with a communal type of native customary rights, claimed over the two Forests, Bukit Berdiri and Stika.

B **The Bukit Berdiri Forest Reserve**

C [14] Gazette Notification No. 760 appears at p. 34 of the timber companies' bundle of documents marked as exh. D1. The defendants are right that this Gazette Notification established only one forest reserve which is over Bukit Berdiri and not Stika as claimed by the plaintiffs in their statement of claim. It was published on 3 June 1952 and in its Second Schedule the rights of the inhabitants of the seven (7) longhouses and twenty (20) persons were specifically recognized and provided for. This is how these rights are spelt out in the Schedule.

E (a) to take timber, poles, fuel, rattan and other climbers, bamboo, dammar, fruit, honey, beeswax and ataps for their own domestic use and for boat-building but not for sale or barter, provided that the quantity of, and the place and manner of collection of such forest produce shall be subject to the control of the Conservator of Forests; and

F (b) to hunt game and catch fish, provided the exercise of this right shall be subject to the provisions of the laws of Sarawak relating to hunting and fishing.

(c) to continue the exercise of rights over temuda already acquired prior to the constitution of the forest reserve on condition that no more virgin forest is felled.

G The rights holders are stated as follows:

All Sea-Dayaks under Penghulu Berong in the following long-houses:

- H 1. Rumah Penghulu Berong.
2. Rumah Jenta.
3. Rumah Runggu.
4. Rumah Anggat.
5. Rumah Apau.
I 6. Rumah Jap.
7. Rumah Mail.

In addition the following persons shall have the right to retain possession of rubber and pepper gardens as stated hereunder, planted prior to the constitution of the forest reserve on condition that no new planting is made.

Name	Rubber garden	Pepper vine	
1. Penghulu Berong	10 acres approx.	300	A
2. Ranga anak Gindi	2 " "	-	
3. Engkabang ak. Bakol	2 " "	-	
4. Koyol anak Beran	3 " "	-	C
5. Limbun anak Sadal	2 " "	-	
6. Bakit anak Tukoh	2 " "	450	
7. Tikong anak Janting	4 " "	-	
8. Jayan anak Manggai	5 " "	400	D
9. Randi anak Ngon	4 " "	100	
10. Leman anak Randong	3 " "	200	
11. Chuat anak Koyol	4 " "	150	
12. Layang anak Leman	4 " "	300	E
13. Bayang anak Tikong	2 " "	-	
14. Subong anak Randong	2 " "	-	
15. Jap anak Berong	-	200	
16. Kawi anak Berong	-	200	F
17. Seman anak Gesi	-	350	
18. Luchi anak Mawang	-	100	
19. Bugon anak Gesi	-	150	
20. Anchot anak Gesi	-	150	G

J.H. ELLIS
Acting Chief Secretary

I pause to note that a very crucial point here. Penghulu Ahtan ak Asong, PW2 was able in his evidence to identify the longhouse he belonged to from the ones listed above, ie, Rumah Penghulu Berong. He was also able to connect the villages in this action to the seven longhouses listed in Gazette Notification No. 760 above and named the present Tuai Rumah or longhouse chief in charge of each village, in place of those named in Gazette Notification

- A No. 760. Incidentally, for the uninitiated, longhouses in Sarawak are commonly named after their chief. I now reproduce the relevant excerpt from the evidence of Penghulu Ahtan ak Asong as mentioned above.
- B (i) Kampung Sungai Arus, then under Penghulu Birong and presently TR. Lawan.
- (ii) Kampong Entanggor, then under Jenta and presently under TR. Gem.
- C (iii) Kampung Sungai Lumut, then under TR. Ranggu and now under TR. Nilie.
- (iv) Kampong Lubuk Mantaor Tungkah Dayak, then under TR. Anggat and presently under TR. Brangka.
- D (v) Kampong Setika, then under TR. Apau and presently under TR. Luso.
- (vi) Kampung Ensika, then under TR. Jap and presently under TR. Sadon.
- E (vii) Kampong Sekitong then under TR. Mail and presently under TR. Jerapang.

- There was nothing in the evidence presented at the trial for me to contradict what Penghulu Ahtan ak Asong had said above and on the strength of his evidence, I accept that the plaintiffs and the people they represent from the seven villages named in this action have inherited the benefits spelt in and from those named in the Gazette Notification No. 760. In my view, the benefits conferred in Gazette Notification No. 760 are akin to that exercisable by Iban claimants of native customary rights under their concept of pemakai menoa and pulau. ‘Pulau’ for the record are patches of virgin forest which was left uncultivated to provide the community it serves with the forest resources such as birds, wild games, plants and timber for their consumption and use. Thus, by gazetting this Forest Reserve, the State Government has recognized that those named therein, and now the plaintiffs after them, have native customary rights over the said Forest.
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The Stika Forest

- I [15] There is evidence tendered by the State Government (at pp. 29-30 of their bundle of documents, exh. D2) of a proposal to constitute a communal forest known as Stika Communal Forest.

This was made in 1953. The boundaries for this proposed communal forest were also indicated in the said proposed Proclamation and it starts from the right bank of Sg. Stika, going along the right bank of Sg. Sebangau then to the mouth of Sg. Entangor before meeting the mouth of Sg. Igak and returning to the left bank of Sg. Sebangau and back to the commencement at the mouth of Sg. Stika. There are coordinates of course of the locations I mentioned above which are unnecessary to repeat here, the important consideration being that the proposed Proclamation also contains a list of longhouses which would benefit from the constitution of this communal forest and what these benefits are, is listed in Schedule II of the same. The said list duplicates that of the longhouses listed in the Bukit Berdiri Forest Reserve's Gazette Notification No. 760 and more or less the same rights were provided in the proposed Proclamation. For the sake of certainty, I would reproduce the said Schedule II below.

The Communal Forest is constituted for the benefit of the permanent inhabitants of the Long house listed below, who shall have the rights:

(a) to take forest produce for their own use, and not for sale or barter;

(2)

(b) to exercise rights in hunting and fishing over the area;

(c) to continue to farm in old "temuda" and to maintain existing rubber and pepper gardens, but no virgin forest shall be felled in the Communal Forest.

1. Rumah Penghulu Berong

2. Rumah Janta

3. Rumah Ranggau

4. Rumah Anggat

5. Rumah Apau

6. Rumah Jap

7. Rumah Mail.

[16] My examination of the maps exhibited in State Government's bundle of documents (exh. D4) ie, p. 1 and p. 2 thereof shows that the two forests ie Bukit Berdiri and Stika are, in fact side by side. Their close proximity to each other lend credence to the

A claim by the plaintiffs that they had used these two Forests for sustenance, by collecting timber for their domestic use, hunting and fishing therefrom. In my view, the existence of the proposed Proclamation renders it probable that the plaintiffs and their ancestors had been and are using the said Forest for their needs.

B [17] This being a civil case, the probability of the existence of the plaintiffs' right and the assertions they made are all that is needed for them to discharge the burden of proof that the law places on them. In the words of Denning J in *Miller v. Minister of Pensions*
C [1947] 2 All ER 372 "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not." In my view, had the proposed Proclamation been gazetted, the plaintiffs' claim for
D Bukit Berdiri Forest, would have been proved beyond reasonable doubt. Even as I reached that conclusion, I would want to be fair to the State Government by addressing this point addressed in their counsels' submission, relevant to the issue at hand.

E ***Nor anak Nyawai's Case***

[18] Ms. Dewi Rahmaz bt. Majidi referred me to the Court of Appeal's judgment in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 CA in which they expressed agreement with the trial judge's decision
F in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 HC that native customary rights claim should not be extended to areas where "they used to roam to forage for their livelihood in accordance with their tradition". The appellate court said that "Such view is logical as otherwise it may mean that vast
G areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food".

H [19] However, that statement must be read in the light of the later considerations made by the Court of Appeal in the said judgment where the court deliberated on the absence of "... corroborative evidence to indicate that there was 'pulau' in the area or that the area was considered as 'pulau' by the respondents or their ancestors". The Court of Appeal then
I continued to say in the remaining paragraphs of the judgment as follows:

We also note that in order to justify his conclusion that the area must have been foraged by the respondents and their ancestors for food including fishing, the learned judge undertook a theoretical exercise. He gave an approximate distance of the area from the furthest longhouse of the respondents and estimated the time taken to walk there.

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As to whether the respondents and their ancestors in fact went to the area to forage for food remained unanswered. At any rate it should not be answered with an assumption as was done by the learned judge. Otherwise it can also be assumed that in the early days the respondents and their ancestors were not interested in the area at all. In any event and as we noted hereinabove there was no evidence adduced to indicate that the Disputed Area was within the territorial domain of the longhouses of the respondents or their ancestors. Even the 'tembawai' found were not within the Disputed Area. Hence, to say that the area was within the 'pemakai menoa' of the respondents without any credible evidence to support it would therefore be factually erroneous. (emphasis added).

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[20] Thereafter the Court of Appeal concluded this issue with the following statements.

On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. *Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available. (emphasis added).*

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The above quoted passages from the Court of Appeal's judgment therefore show that there is no outright rejection, nor should it be, of the establishment of plaintiffs' native customary rights by foraging for food in the jungle. Although it is indeed logical that there be limits to the area where the foraging should be recognized as establishing native customary rights, but in this case, that the limit has been set by the constitution of the Bukit Berdiri Forest Reserve and in the proposal to proclaim the Stika Forest as a Communal Forest. The documents in proof of these, ie, Gazette Notification No. 760 and the proposed Proclamation, both tendered by the defendants themselves, are the express and implied acknowledgment of the plaintiffs' native customary rights over the two Forests.

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A [21] In the face of these written documents, I see no necessity to refer to the evidence of the aerial photograph to resolve the plaintiffs' claim of native customary rights over the two Forests and is also the reason why I chose not to dwell at length on the testimonies of the witnesses at the trial.

B **Evidence Of Encroachment**

C [22] I now turn to the allegations made by the plaintiffs of the encroachments by the timber companies by their illegal logging and the building of the rail line. To recapitulate, the plaintiffs' physical evidence of the encroachment is in their map marked 'M' annexed to their statement of claim (exh. P2) for it is there that areas where the alleged encroachment occurred were shaded and shown.

D [23] The defendants' counsels in this case have dissuaded me from relying on that map produced by Mr. Nicholas Mujah and questioned his knowledge and expertise in producing that map.

E [24] Mr. Nicholas Mujah was candid enough to admit in his cross-examination that he was not a registered surveyor. Thus, under s. 17(a) of the Land Surveyors Ordinance 2001, he is not allowed to 'undertake any cadastral land survey in the State of Sarawak'. Cadastral land survey is defined under the Act as 'any survey undertaken to mark, identify or determine the extent or boundary or the measurement, of any parcel or area of land, and includes title survey'. Ms. Dewi Rahmaz bt. Majidi also cited the decision of Hamid Sultan bin Abu Backer, JC (as His Lordship then was) in *TR Usah Lutong & Ors v. Lembaga Tabung Haji & Ors* [2009] 9 CLJ 296 where His Lordship rejected a map prepared by an unregistered land surveyor under the same section.

G [25] I agree that there is force in her argument based on these sections and although the map was admitted as evidence without objections by the defendants' counsels, there is very little weight I could attach to it since the maker is not an expert on map drawing. I should not therefore rely on it to establish the allegations of encroachments made against the timber companies.

H [26] Other than the oral evidence of the plaintiffs' witnesses, their police reports and the map, there are no other evidence adduced to show the illegal logging claimed by them. As for the police reports, Ms. Esther Wong in her written submission highlighted to me the contradiction between the plaintiffs' pleaded case and the

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police reports of Mr. Nicholas Mujah and Mr. Pili anak Mit on the alleged encroachments. In their statement of claim, the plaintiffs pleaded that the encroachments was discovered in January 2006 but in their police reports, they said it was discovered on 27 November 2006. She also referred to the evidence of Lai ak Nyambong (PW5), who was from Kampung Entanggor and who I earlier mentioned was one of those who lodged a police report (on 14 September 2006) against the alleged encroachment. In his cross-examination, he first said that he knew of the encroachment after meeting a worker of the 2nd defendant but subsequently said Mr. Nicholas Mujah told him about it. He agreed that before lodging the police report there was no complaint from him or his longhouse folks about the encroachment by the 2nd defendant and also agreed that it was the 1st plaintiff who asked him to lodge the police report against the 2nd defendant. Given these unsatisfactory state of evidence, the oral testimonies of the witnesses and their police reports, without more, are not sufficient, in my view to discharge the burden of proving, under ss. 101 and 103 of the Evidence Act 1950, the alleged illegal logging. Some independent evidence of it is needed because allegations such as this is always easy to make and I should therefore be wary and on guard against the abuse of the court's process to perpetuate and further the interest of persons, other than those who are genuinely aggrieved by the acts of the person so accused.

Construction Of The Rail Line

[27] Lest it be forgotten, I must at this stage reiterate that the allegations of encroachments levelled against the timber companies pleaded in this case are not just the illegal logging in the Bukit Berdiri Forest and the Stika Forest but also the construction of the rail line in the two Forests. Though I find the allegation of illegal logging is not proved, I am certain that the allegation of encroachment from the construction of the rail line has been more than satisfactorily proven.

[28] It is fair before I give my reason for reaching that last conclusion to refer to, firstly, the evidence of the 2nd defendant's camp manager, Mr. Tiong Ching Cheong and their counsel's submission on this. Mr. Tiong Ching Cheong testified that the rail line was built over swampy lands which were prone to flooding and was unsuitable for human settlement or cultivation of crops

- A or planting of fruit trees. In answer, I would just state this, in case it is not already made clear and that is, the plaintiffs' claim of native customary rights here is not for land which they lived and cultivated on but one where they forage for food, hunt and fish. A swampy land does not render all these impossible because it is
- B common enough knowledge in Sarawak that certain fresh water fishes such as catfish thrive in swampy land and the natives eat an endemic plum called "asam payak" which grows only in its soil. Another indigenous plant which grows on swampy land, the "nibong" tree is usually eaten for its shoot and the trunk used as
- C a building material.

- [29] As for Ms. Esther Wong's submission, she said the construction of the railway line and access roads were approved by the Director of Forests and in giving the approval the said
- D Director had ensured that they did not encroach or trespass into the Bukit Berdiri Forest Reserve. This submission is clearly against the evidence presented by the State Government in the very maps prepared by the Forest Department (at p. 1 of exh. D2) and by the Land & Survey Department, Samarahan Division (at p. 2 of
- E exh. D2) respectively. The rail line is clearly shown in these two maps to have been drawn right across the Stika Forest and transversed part of the Bukit Berdiri Forest Reserve and the probable reason why it was so is also so obvious. It is to connect the area under the timber licence given to the 1st defendant
- F which was separated by the two Forests. Thus, by the defendants' own evidence, and this constitutes the definitive evidence for my conclusion, there was encroachment of the two Forest areas and for which restitution must be made to the plaintiffs.

G **Compensation For The Rail Line**

- [30] The timber companies have included in their bundle of documents admitted as exh. D3, agreements made with residents from several villagers in the vicinity of the licensed area to
- H compensate them for the construction of, *inter alia*, the rail line. These villages are Kampung Stika, Kampung Petai, Kampung Sg. Nibong, Kampung Sg. Tambai, Gerunggang and Kampung Entangor where the 2nd plaintiff was from. In respect of that last kampong however, the compensation is said to be for 'sembahyang padi'. All these agreements were made in 2004, except that for
- I 'sembahyang padi' the deed was made in 2005. Of all these

villages, only Kampong Stika and Kampung Entangor are the affected ones being the two named in this action. However, for the purpose of this action, what was paid to the villagers of Kampong Entangor, could not be considered as compensation for the rail line because from its very name, 'sembahyang padi' does not denote rail line. Furthermore, when Mr. Lai ak Nyambong who was from Kampung Entangor was cross-examined by Ms. Esther Wong, it was also not put to him that the compensation (which by the way he denied receiving) was for the rail line. Therefore, it is safe for me to say that only one village received compensation for the rail line, ie, Kampung Stika, leaving six (6) other villages out in the cold.

[31] Ms. Esther Wong in her written submission also said her clients' construction of the rail line being approved by the Director of Forests, they have therefore not committed any actionable wrong. In answer to this submission, I would just refer to three things. First, the timber licence granted to her client appearing at pp. 1-33 of their bundle of documents exh. D1 and more specifically to cl. 28 thereof which they themselves highlighted in green, provides that it is "*granted subject to the native and other rights specified in s. 65, of the Forest Ordinance*" (emphasis added). Section 65 allows the felling of timber (other than in a forest reserve) for domestic use. Secondly, it is in her submission that the working plan and a plan for road access or rails were submitted by her clients to the Forest Department for approval (see para. (4) at p. 10 of Ms. Esther Wong's written submission). Lastly, a locality map was also attached to the timber licence. What I can deduce from these collective facts and the only logical inference to be made from them is that the timber companies were aware right from the start that their licence is subject to native right and when they submitted the plan for the rail line, it was transversing the two Forests.

[32] By submitting such a plan, the timber companies therefore cannot deny liability of wrongdoing against the plaintiffs. Similarly by approving that plan, the Director of Forests (and the Government of Sarawak) is conjointly liable to the plaintiffs who did not receive compensation for the construction of the rail line. As for those who did receive compensation, ie the villagers from Kampung Stika it would only be fair that they be excluded from

A receiving such payment of damages. In my view, unless fraud, misrepresentation or mistake of fact are proved in the execution of the said deeds, these villagers must be bound by what they have signed or thumbprinted.

B Delay Not An Issue

[33] I purposely leave the consideration of the defendants' defence of delay and inaction by the plaintiffs of the encroachments last as the full facts supporting the earlier issues I have decided show that the compensation for the rail line was only made in 2004 and the police reports on the illegal logging was made in 2006. The plaintiffs' action herein is founded upon these two matters and not the issuance of the timber licence to the 1st defendant granted in 1966. It is therefore obvious that their cause of action does not start with the granting of the licence but with these two matters which had been specifically pleaded.

The Final Orders

E [34] When I finished the first draft of this judgment it was on 21 March 2011. The significance of that date was not lost to me for it was World Forestry Day which was first celebrated on 21 March 1972. The Minister of Natural Resources & Environment was quoted in the New Straits Time published on the same date in its "Advertorial" at p. 11 that this year's theme is 'Forest For Community Livelihood' and that 2011 had been officially declared as the International Year of Forests with another appropriate theme, 'Forest for People'. Thus, it would appear that the plaintiffs' struggle for the recognition of their communal rights over and the preservation of the two Forests also has an international face and a name.

[35] Various declaratory reliefs have been prayed by the plaintiffs in pursuit of that struggle but the evidence presented and my considerations of it move me to end this judgment with only these orders.

(i) The plaintiffs have inherited native customary rights over the Bukit Berdiri Forest Reserve and the Stika Forest, the boundaries of which are as delineated and shown in the maps produced by the Forestry Department Sarawak and Land & Survey Department Sarawak appearing at pp. 1 and 2 of exh. D4.

- (ii) The construction of the rail line across these two Forests constitutes an encroachment and a trespass of the land. **A**
- (iii) The defendants are jointly and severally liable to pay damages, to be assessed by the deputy registrar, to the plaintiffs (except those from Kampung Stika) for the said trespass. **B**
- (iv) Costs of the action for the plaintiffs which I fix at RM50,000 to be paid equally by the timber companies and the State Government. **C**
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D**E****F****G****H****I**